



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO. 22 OF 2018.**

**SPEDAG INTERFREIGHT KENYA LIMITED.....1<sup>ST</sup> PLAINTIFF**

**SPEDAG INTERFREIGHT TANZANIA LIMITED.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**JYOTI STRUCTURES LIMITED.....1<sup>ST</sup> DEFENDANT**

**JYOTI STRUCTURES KENYA LIMITED.....2<sup>ND</sup> DEFENDANT**

**KENYA ELECTRICITY TRANSMISSION COMPANY LTD**

**(KETRACO).....APPLICANT/OBJECTOR**

**R U L I N G**

1. The matter for determination before this Court is the Notice of Motion dated 3<sup>rd</sup> December, 2020 by the Kenya Electricity Transmission Company Ltd (KETRACO) the applicant/objector, in which it seeks the following orders-

(i) Spent;

(ii) Spent;

(iii) That there be a stay of execution of the ruling and orders of the Hon. Justice P.J. Otieno delivered on the 30<sup>th</sup> November, 2020 pending the hearing and determination of the applicant's intended appeal;

(iv) That this Honourable Court be pleased to grant any further relief it may deem fit; and

(v) That the costs of this application be provided for.

2. The application is premised the affidavit sworn on 3<sup>rd</sup> December, 2020 by Lydia Wanja, the objector's Legal Manager, In response thereto, the plaintiff/deeree holder on 11<sup>th</sup> December, 2020 filed a replying affidavit sworn on the same day by Justus Muganda, the plaintiff's Finance Manager. In a rejoinder, on 10<sup>th</sup> February, 2021, the applicant filed a supplementary affidavit sworn on 1<sup>st</sup> February, 2021 in support of the Motion.

3. The application was canvassed by way of written submissions. The applicant's submissions were filed on 15<sup>th</sup> July, 2021 and 9<sup>th</sup> August, 2021 by the law firm of Mulondo & Co. Advocates, while the decree holder's submissions were filed on 15<sup>th</sup> July, 2021 by the law firm of A.B. Patel & Patel Advocates.

6. Mr. Mulondo, learned Counsel for the objector submitted that the applicant is a wholly owned State Corporation charged with, *inter alia*, the duty of building, operating, and maintaining high voltage electricity lines. He stated that on account of an irregular attachment of its funds, on 18<sup>th</sup> September, 2020, the objector was served with an interim garnishee order *nisi* dated 26<sup>th</sup> August, 2020 attaching all its monies contained in its account held by the garnishee herein. He further submitted that the garnishee order indicated that the objector's debt to the decree holder stood at US\$ 1,456,506.42 which amount continues to accrue interest at a monthly rate of US\$ 9,004.86 as from 17<sup>th</sup> August, 2020.

7. He submitted that the objector intends to lodge an appeal to the Court of Appeal against the ruling delivered on 30<sup>th</sup> November, 2020, which irregularly attached the objector's monies held by the garnishee. Further, that the contracts between the objector and the defendants were terminated on account of liquidation proceedings against the defendants. He stated that an audit needs to be undertaken to determine any outstanding payments and the value of outstanding works, since it was a requirement for the contracts between the objector and the defendants that the amounts payable to them would only be paid out when the defendants raised their invoices and the same had to be approved by the objector.

8. It was contended that the objector does not hold any monies in favour of the defendants since all the monies due to them are held by the respective financiers for each project, and the same are directly disbursed to the defendants upon completion of the projects. It was stated that the objector would suffer substantial loss if the decree holders enforce the garnishee order absolute and obtain the payment of a colossal sum of US\$ 1,456,506.42 which amount continues to accrue interest at a monthly rate of US\$ 9,004.86 as from 17<sup>th</sup> August, 2020. It was stated that the said money was never meant for the projects undertaken by the defendants.

8. Mr. Mulondo submitted that vide a ruling in Nairobi HCCC No. 38 OF 2018, the objector was ordered to freeze the sums of US\$ 2,581,978.35 until the hearing and determination of the said suit, which is yet to be determined. It was submitted that the orders in the said suit take precedence over the orders issued by this Court. It was stated that the monies in the objector's accounts held by the garnishee are to be utilized for compensation of wayleaves for projects that are currently on course and that the said monies are not held in favour of the defendants. It was contended that on the aforesaid ground, the objector had demonstrated an arguable appeal.

9. The objector's Counsel cited the case of **Karolyne Mwatha Mburu & 2 others v Athi Water Services Board & another** [2019] eKLR, where the Court held that an arguable appeal is one that is not frivolous and one that raises a *bona fide* issue that deserves to be argued before the Court. He cited the decision in **Kenya Breweries Limited vs. Kiambu General Transport Agency Limited** [2006] eKLR, where the Court held that where an applicant has an undoubted right of appeal, a large amount of money involved in the dispute between the parties constitutes a special circumstances meriting grant of stay of execution pending an intended appeal.

9. Still on the issue of whether the applicant will suffer substantial loss, the objector's Counsel submitted that the 2<sup>nd</sup> decree holder is a foreign owned company incorporated and registered in Tanzania and has no assets in Kenya and there is a likelihood that it would be unable to pay back the colossal amounts if the subsequent appeal succeeds, since it had not given any evidence as to its financial capacity and ability to refund the decretal sum.

10. On the issue of the instant application being filed without unreasonable delay, Mr. Mulondo submitted that the application for stay of execution pending appeal was filed on the 3<sup>rd</sup> December, 2020, which was three days after the ruling delivered on 30<sup>th</sup> November, 2020 hence there was no unreasonable delay on the part of the objector.

11. On the issue of willingness to furnish security, Mr. Mulondo submitted that the amounts attached conditionally form sufficient security for due performance of the decree and that the plaintiffs will not suffer prejudice should stay of execution be granted since the applicant being a government corporation, has the capacity to pay the amounts claimed if the intended appeal is to be dismissed and further, the conditional attachment having not been set aside as such, the monies claimed would be available to the plaintiffs if the appeal fails.

12. On whether the instant application is *res judicata*, he submitted that the allegations of *res judicata* by the plaintiffs had not been proved. It was the objector's submission that the circumstances in which the two applications are raised are different as the application dated 1<sup>st</sup> October, 2020 sought stay of execution of the decree dated 10<sup>th</sup> April, 2018, and for the setting aside the garnishee order *nisi* dated 26<sup>th</sup> August 2020, whereas the application dated 3<sup>rd</sup> December, 2020 seeks an order for stay of execution pending appeal. It was submitted that in filing the present application, the applicant was not in any way trying to re-open litigation over a matter already adjudicated by a Court of competent jurisdiction.

13. Mr. Khagram, learned Counsel for the plaintiffs submitted that it is an abuse of the Court process for a party to make an application for the same reliefs before this Court after a previous application had been adjudicated upon under the principle of *res judicata*. He further submitted that the objector has no *locus standi* in this matter to seek an order for stay of execution of the decree on precisely the same reasons as were given by this Court in its ruling of 13<sup>th</sup> July, 2018 on the objector's application for joinder, given that it had already been adjudged to be a party without any interest in the proceedings and simply one that is holding sums due to the defendants for completed works. He stated that it was the said funds which were being sought to be attached and paid over to the plaintiffs in satisfaction of the decree.

14. He further submitted that the objector has no such interest and cannot therefore validly or lawfully object to the execution proceedings by the garnishee when its own objection to the attachment was rejected by the Court in its ruling of the 8<sup>th</sup> May, 2019, when the Court dismissed the application by the objector to set aside the conditional attachment orders made on 10<sup>th</sup> April, 2018.

15. Mr. Khagram stated that for the aforementioned reasons, the intended appeal is and cannot be said to be arguable. Further, he submitted that there could not be any substantial loss on the part of the objector, since the funds being attached were admitted to be due and owing to the defendants for works already completed by them.

#### **ANALYSIS AND DETERMINATION.**

16. This Court has considered the present application, the supporting affidavit, replying affidavit and the supplementary affidavit. It has also considered rival submissions, including the various cases cited. The issues that arise for determination are:

**(i) Whether the instant application is *res judicata*; and**

**(ii) Whether the orders for stay of execution pending appeal are merited.**

17. In the supporting affidavit sworn by Lydia Wanja, she averred that the ruling and order issued on 30<sup>th</sup> November, 2020 in the absence of Counsel for the objector, allowed the plaintiffs to attach up to US\$ 1,465,506.42 belonging to the objector (a State Corporation) wholly owned by the government and charged with, *inter alia*, the duty of building, operating, and maintaining high voltage electricity lines and associated substations that form the backbone of the national transmission grid. She deposed that public funds held in favour of the objector by the garnishee for completion of critical public infrastructure projects would be attached, leading to stalling of various projects.

18. The deponent averred that the objector has a meritorious appeal, since it is not indebted to the Judgment debtors to the tune of US\$ 1,465,506.42 as awarded by Court and that a Notice of Appeal dated 3<sup>rd</sup> December, 2020 was lodged. She further averred that there is a threat that the plaintiff may execute the decree at any time, rendering the intended appeal nugatory and thereby causing the objector irreparable loss and damage. She stated that no prejudice would be suffered by the plaintiffs if an order for stay pending appeal is granted.

19. In the replying affidavit by the plaintiffs in opposition to the application herein, its deponent Mr. Justus Muganda averred that it is a fact that the objector previously acknowledged on oath, and on record being indebted to the defendants for an amount in excess of US\$ 4,600,000.00 on account of works completed by the defendants. He also averred that it is based on the said amount that the Court issued conditional attachment orders, and some orders were issued in favour of UBA Bank, both totalling just over US\$ 4,200,000.00, well below the amounts owed by the objector to the defendants.

20. The deponent drew the Court's attention to the orders of conditional attachment issued on 10<sup>th</sup> April, 2018 and varied on 30<sup>th</sup> April, 2018 as well as the Court's Judgment of 8<sup>th</sup> May, 2019 and the ruling of the 13<sup>th</sup> July, 2019, and averred that since the

decision of 13<sup>th</sup> July, 2019 had not been appealed from, the same remained valid and a binding determination of the Court. He deposed that the objector was estopped from challenging the plaintiffs' right to payment of the decretal amount out of the objector's indebtedness to the defendants, which the Court found to be US\$ 4,200,000.00.

21. The deponent deposed that the issues raised herein by the objector were also raised in their application dated 22<sup>nd</sup> May, 2018, which was adjudicated upon and a determination was made. It was further deposed that the objector cannot purport to utilize funds owing to the defendants for a project that was completed, commissioned and which is in use, for another project since the same would amount to diversion of funds and unjust enrichment.

22. The deponent also averred that no prejudice would be suffered by the objector as it had already received consideration for and benefit of the attached amounts which were payable on account of a project that had already been confirmed, commissioned and already in use by the objector as confirmed in the pleadings filed. It was stated that the plaintiffs would suffer immense prejudice and shall continue to suffer such prejudice since they have been kept out of monies properly and justly due to them since the year 2014 and in respect of which the defendants entered into a settlement agreement in 2016. Further, the deponent averred that the amount due is substantial and it was affecting the plaintiffs' cash flow adversely.

23. In a rejoinder, through a supplementary affidavit sworn by Lydia Wanja, she averred that it is not disputed and the Court record shows that the order of conditional attachment of the applicant's funds made on 10<sup>th</sup> April, 2018 and varied on 30<sup>th</sup> April, 2018, was made *ex parte*, in the absence of the objector, and that the application by the objector seeking to be joined in the proceedings and for the setting aside of the order issued on 10<sup>th</sup> April, 2018 was dismissed vide a ruling delivered on 13<sup>th</sup> July, 2018, and that the ruling delivered on 8<sup>th</sup> May, 2019, in which Judgment was entered in favour of the decree holders was made pursuant to proceedings between the decree holders and the Judgment debtors, and the applicant was not a party in the suit.

24. The deponent averred that the instant application only seeks to preserve the status quo and safeguard public funds, and the same does not seek to reopen the proceedings made earlier or to re-litigate applications, which have already been dealt with. Further, the application for attachment of the objector's funds to the credit of the Judgment debtors allegedly payable to them under the contracts between the applicant and the Judgment debtors, when the objector does not owe the defendants any monies, since payment for the contracts was to be made directly to the defendants by the financiers of the various projects. It was deposed that the defendants only completed part of the Suswa-Isinya transmission line before the 1<sup>st</sup> Judgment debtor began undergoing insolvency proceedings in India, leading to the termination of the contractual relationship between the objector and the defendants. It was further averred that the status of the said contracts was explained in the affidavit sworn by Eng. Anthony Wamukota on 1<sup>st</sup> October, 2020 in support of the objector's application which was dismissed vide a ruling delivered on 30<sup>th</sup> November, 2020.

25. The deponent averred that there is no admission by the objector that it owes the Judgment debtors an amount exceeding US\$ 4,200,000.00 as alleged by the deponent in the plaintiffs' replying affidavit. She stated that the "*admission*" referred to by the Court, refers to an affidavit by Fred Chumo, the Head of Legal and Company Secretary of UBA Bank limited on 29<sup>th</sup> January, 2018, but he is not an employee of the objector, and that the money that was being held by the bank as per pleadings filed by the applicant in Nairobi HCCC No. 38 of 2018, which is still pending determination was only retention money pending the defect liability period and the carrying out of a joint financial audit of the completed project. She averred that the said processes were yet to be carried out, due to the insolvency of the 1<sup>st</sup> Judgment debtor, hence it cannot be ascertained that any money would be due to the Judgment debtors from the retention money.

## **ANALYSIS AND DETERMINATION**

- (i) Whether the instant application is *res judicata*; and**
- (ii) Whether the prayer for stay of execution pending appeal is merited.**

### **Whether the instant application is *res judicata*.**

26. I have considered the plaintiffs' application in the nature of a Preliminary Objection to the effect that the suit should be struck out for reasons that by virtue of the provisions of Section 7 of the Civil Procedure Act, the Court lacks jurisdiction to hear and determine the application for being *res judicata*. An application dated 1<sup>st</sup> October, 2020, was heard and determined by the Court

vide a ruling delivered on 8<sup>th</sup> May, 2019 and the Court dismissed the objector's application to set aside the conditional attachment orders made on 10<sup>th</sup> April, 2018.

27. Section 7 of the Civil Procedure Act provides as follows on the doctrine of *res judicata*-

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”***

28. A perusal of the application dated 1<sup>st</sup> October, 2020 and the current one dated 3<sup>rd</sup> December, 2020 confirms that they seek prayers for stay of execution. In particular, prayer 3 of the objector's application dated 1<sup>st</sup> October, 2020 and prayer 2 of the present application are similar in nature. The first application that was filed sought an order for the Court to issue an interim order for stay of execution of the decree dated 10<sup>th</sup> April, 2018 and varied on 30<sup>th</sup> April, 2018, while the present application seeks an order for stay of execution of the order that made the garnishee order nisi dated 25<sup>th</sup> August, 2020, absolute. The departure in the two applications in my view is that the application filed on 1<sup>st</sup> October, 2020 is premised on Order 22 Rule 51 and 52 of the Civil Procedure Rules, while the present application is anchored on Order 42 Rule 6 of the Civil Procedure Rules.

29. Having analyzed the two applications, I draw the conclusion that they are not similar as the first one sought stay of execution pending determination of an application to set aside *ex parte* proceedings, Judgment, and the decree entered in favour of the plaintiffs, while the present application seeks stay of execution pending appeal of the ruling delivered on 30<sup>th</sup> November, 2020. The principles to be considered in either case are different. In an application for setting aside *ex parte* proceedings, the considerations are sufficient cause for default, delay in bringing the application, adequate defence, prejudice to be occasioned, among others. On the other hand, in an application for stay of execution pending appeal the principles applicable are that the appeal is an arguable one, whether the appeal would be rendered nugatory if the orders are not granted and the requirement for the applicant to provide security. This Court's finding therefore is that the present application is not *res judicata*.

#### **Whether the prayer for stay of execution pending appeal is merited.**

30. An order for stay of execution is a discretionary one but such discretion is fettered by the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 that-

**(i) the application must be made without undue delay.**

**(ii) the applicants must demonstrate that they will suffer substantial loss unless the order sought is granted.**

**(iii) security as the Court orders for the due performance of such decree or order as may ultimately be binding has been given by the applicant.**

31. In **Butt vs. Rent Restriction Tribunal** [1982] KLR 417, the Court gave guidance on how this discretion should be exercised and held that: -

***“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.***

***2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.***

***3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.***

***4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special***

*circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.*

*5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”*

32. On the first condition on whether the application was filed without undue delay, it is noted that the ruling for the application dated 1<sup>st</sup> October, 2020 seeking, *inter alia* stay of execution was delivered on 30<sup>th</sup> November, 2020. The application herein was filed on 3<sup>rd</sup> December, 2020. There was a period of three (3) days from the date of the ruling, to the time of filing of the present application. That was reasonable time.

33. On the second condition of the substantial loss likely to be suffered by the applicant if stay of execution is not granted; it was deposed that the the 2<sup>nd</sup> plaintiff is a foreign owned company incorporated and registered in Tanzania and has no known assets in Kenya. It was thus contended that there is a likelihood that it would be unable to pay back the colossal amounts if the subsequent appeal succeeds.

34. In **Job Kilach vs. Nation Media Group & 2 others** Civil Application No. Nai. 168 of 2005, the Court of Appeal in citing **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited** Civil Application No. Nai. 358 of 1999 held as follows-

*“where there is a decree against the Applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenya standards very few individuals will be in a position to pay without being overly destabilized. Therefore where there is a large sum of money involved the court may take that in consideration in an Application for stay of execution. Where execution of a money decree is sought to be stayed, in considering whether the Applicant will suffer substantial loss, the financial position of the Applicant and that of the Respondent becomes a central issue. The Court cannot shut its eyes where it appears the possibility of the Respondent refunding the decretal sum in the event that the Applicant is successful in his appeal is doubtful. The Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory.”*

35. In the application herein, allegations have been made that the plaintiffs would not be in a position to refund the money in the garnishee’s possession. The plaintiffs herein failed to rebut the allegations by the objector by way of affidavit evidence in order to demonstrate that they would be able to refund the decretal sum should the objector’s appeal succeed. That therefore means that the objector risks losing the sum of US\$ 1,456,506.42 which amount continues to accrue interest at a monthly rate of US\$ 9,004.86 as from 17<sup>th</sup> August, 2020.

36. Regarding the third condition, under the provisions of Order 42 Rule 6(1)(2) of the Civil Procedure Rules, a party seeking stay of execution must offer such security for the due performance of the orders as may ultimately be binding on the applicant. In the instant case in my view, the amount of money conditionally attached by the order issued on 10<sup>th</sup> April, 2018 and subsequently varied on 30<sup>th</sup> April, 2018 forms sufficient security for the due performance of the decree.

37. In the said circumstances the application dated 3<sup>rd</sup> December, 2020 is hereby allowed. The costs of the application will abide the outcome of the appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 31ST DAY OF MARCH, 2022.**

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the then Chief Justice on the 17<sup>th</sup> April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Mr. Ondego for the plaintiffs

Mr. Mulondo for the applicant/objector

No appearance for the defendants

Mr. Oliver Musundi – Court Assistant.



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